Dah Sing Insurance Agency Ltd & Anor v Best Re (L) Ltd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-499–12 OF 2017
MOHD NAZLAN J
11 JANUARY 2019

Insurance — Reinsurance — Claim for — Plaintiffs and defendant entered into reinsurance agreements — Defendant agreed to indemnify plaintiffs pursuant to reinsurance agreement — Defendant failed to make payment — Plaintiff claimed for sum due and owing under reinsurance agreements — Defendant counterclaimed for unpaid premium — Net due concept — Whether there was net due to the plaintiffs under reinsurance agreements — Whether plaintiffs failed to make payment of premium to the defendant

The parties in the present case were involved in the insurance and reinsurance business. The dispute between the parties stemmed from the Motor Treaties and the Combined Liability Excess of Loss Treaties ('the reinsurance agreements') entered by the plaintiffs and the defendants. In essence, pursuant to the said reinsurance agreements, the defendant had agreed to indemnify the plaintiffs. The plaintiffs' pleaded case was that the sum of HKD11,592,975.90 being the claim receivable arising from the underlying policies subject to the reinsurance agreements was due and owing from the defendant under the reinsurance agreements. The defendant on the other hand filed a counterclaim premised on the allegation that the plaintiffs had failed to pay to the defendant as the reinsurer, the aggregate premium sum of HKD2,887,788.47 payable in respect of five reinsurance arrangements ('the counterclaim agreements'). The issues for the court's determination were: (a) whether there was net due to the plaintiffs under the reinsurance agreements; and (b) whether the plaintiffs failed to make payment of premium to the defendant.

Held, allowing the plaintiffs' claim, and dismissing the defendant's counterclaim:

(1) Given the testimony of the witnesses including the key witness for the defendant, the concept of net due was one that was readily implied in the Account & Settlement clause of the Motor Treaties since the words 'account settlement balance' concerned the balance in the statement of accounts which clearly showed the difference between the premium payable and claims receivable, and this constituted the net due (see para 25).

(2) Based on the testimony of all the witnesses for the plaintiffs, the payment of premium by way of net due was part of established market practice in

reinsurance. Further, this arrangement of payment of premium by way of net due was in evidence, the mutually accepted course of conduct between the parties. The remittance advices also showed that payments of the premium to the defendant were affected by setting off the premiums payable against the claims receivable, and the payment of the resulting net due to the defendant. The defendant was therefore estopped from taking a contradictory stand now (see para 31).

(3) The defendant's contention that the plaintiffs failed to show each and every single insurance claim in respect of the underlying policies, made against the second plaintiff that resulted in the reinsurance claims by the plaintiffs against the defendant was without merit. The defendant did not identify any provisions in either or any of the Motor Treaties and the Combined Liability Excess of Loss Treaties to such effect. The defendant could not do so because such a provision did not exist. It was clear that the Motor Treaties and the Combined Liability Excess of Loss Treaties only required notification of losses when the reporting threshold in the preliminary loss advice clauses were met. Despite protestations and denials by the defendant as expressed in its pleadings, there was no evidence that the defendant had ever required additional information or further documents. Neither did the defendant invoke the claims control clause to verify the authenticity of claims, thus further supporting the plaintiffs' assertion that the defendant's argument of breach by the plaintiffs and repudiation by the defendant was a mere afterthought (see paras 33–34 & 38–39).

(4) For the Combined Liability Excess of Loss Treaties, Aon Benfield was the appointed broker for the plaintiff and acted as the plaintiffs' intermediary, in managing the issuance of the various documents such as the bi-annual financial statements, payment advices and/or debit notes to show the net due from the plaintiff in relation to the Combined Liability Excess of Loss Treaties, to be followed by payment by the plaintiffs to the defendant through Aon Benfield. The court found that the payment arrangement of the premium for the Combined Liability Excess of Loss Treaties was consistent with article 22 Intermediary clause of the Combined Liability Excess of Loss Treaties. Further, the court accepted the evidence that all payments of the net due by the plaintiffs to Aon Benfield in respect of, amongst others, the Combined Liability Excess of Loss Treaties, had been given to the panel of reinsurers, including the defendant (see paras 57–58).

(5) There was no evidence of any response from the defendant when the plaintiff through its solicitors sent letters of demand to the defendant demanding payment under the Motor Treaties and the Combined Liability Excess of Loss Treaties. The present denial by the defendant when it chose to remain silent earlier suggested an afterthought on its

part. The courts had held that in commercial and business relationships, the failure of one party to deny a solicitor's demand by the opposing party would amount to an implied admission (see paras 59–60).

(6) It was difficult to see how the defendant could succeed in its counterclaim for alleged unpaid premium by the plaintiffs of a total of HKD2,887,788.47 in respect of various reinsurance treaties. In the first place, the plaintiffs had shown that there was no unpaid premium as the net due was positive in favour of the second plaintiff. All the premium payable in respect of the Combined Liability Excess of Loss Treaties had been shown to have been fully paid. The payment of premium in respect of the Combined Liability Excess of Loss Treaties was substantiated by the defendant's own supporting documents. In the absence of evidential support and in the face of the testimony and documents exhibited by the plaintiffs that strongly suggested the contrary, the case of the defendant was inevitably one that was considerably lacking in merit (see paras 63–64).

[Bahasa Malaysia summary

Pihak-pihak dalam kes semasa terlibat dengan perniagaan insurans dan reinsurans. Perbalahan diantara pihak-pihak adalah berpunca daripada 'Motor Treaties' dan 'Combined Liability Excess of Loss Treaties' ('perjanjian-perjanjian reinsurans') yang dimasuki oleh plaintif-plaintif dan defendan. Pada asasnya, berdasarkan perjanjian-perjanjian reinsurans tersebut, defendan telah bersetuju untuk membayar gantirugi kepada plaintif-plaintif. Kes yang diplidkan oleh plaintif-plaintif adalah bahawa, jumlah HKD11,592,975.90 sebagai jumlah tuntutan yang belum diterima yang berpunca daripada polisi dasar yang tertakluk kepada perjanjian-perjanjian reinsurans adalah terhutang dan perlu di bayar oleh defendan berdasarkan perjanjian-perjanjian reinsurans. Defendan pula memfailkan tuntutan silang berdasarkan hujahan bahawa plaintif-plaintif telah gagal untuk membayar kepada defendan sebagai 'reinsurer', jumlah agregat premium sebanyak HKD2,887,788.47 yang perlu dibayar berkenaan dengan lima perjanjian reinsurans ('perjanjian-perjanjian tuntutan silang'). Isu-isu yang memerlukan penentuan mahkamah adalah: (a) sama ada terdapat 'net due' kepada plaintif-plaintif berdasarkan perjanjian-perjanjian reinsurans; dan (b) sama ada plaintif-plaintif gagal membuat bayaran premium kepada defendan.

Diputuskan, membenarkan tuntutan plaintif-plaintif dan menolak tuntutan silang defendan:

(1) Berdasarkan keterangan saksi-saksi termasuk saksi utama defendan, konsep 'net due' adalah suatu konsep yang tersirat di dalam klausa 'Account & Settlement' dalam 'Motor Treaties' memandangkan ayat 'baki penyelesaian akaun' adalah berkaitan dengan baki di dalam penyata akaun yang secara jelasnya menunjukkan perbezaan di antara premium

yang perlu dibayar dan tuntutan yang belum diterima, dan ini membentuk 'net due' (lihat perenggan 25). A

(2) Berdasarkan keterangan semua saksi plaintif-plaintif, bayaran premium melalui kaedah 'net due' adalah merupakan amalan dalam pasaran reinsurans. Tambahan pula, berdasarkan keterangan, kaedah pembayaran premium melalui 'net due' merupakan kaedah yang dipersetujui bersama di antara pihak-pihak. Nota pengiriman wang juga menunjukkan bahawa bayaran premium kepada defendan dilakukan dengan cara menolak jumlah premium yang perlu dibayar daripada jumlah tuntutan yang beum dibayar, dan pembayaran 'net due' yang terhasil kepada defendan. Oleh itu, defendan dihalang untuk mengambil kedudukan yang bercanggah (lihat perenggan 31). B C

(3) Hujahan defendan bahawa plaintif-plaintif gagal untuk menunjukkan setiap satu tuntutan insurans berkaitan dengan polisi dasar yang dibuat terhadap plaintif kedua yang membawa kepada tuntutan reinsurans oleh plaintif-plaintif terhadap defendan adalah tidak bermerit. Defendan tidak menyatakan apa-apa peruntukan di dalam salah-satu atau kedua-dua 'Motor Treaties' dan 'Combined Liability Excess of Loss Treaties' yang membawa kepada kesan tersebut. Defendan tidak menyatakan berkenaan peruntukan tersebut kerana peruntukan tersebut tidak wujud. Adalah jelas bahawa 'Motor Treaties' dan 'Combined Liability Excess of Loss Treaties' memperuntukkan bahawa pemakluman berkenaan kerugian hanya diperlukan jika ambang laporan di dalam 'preliminary loss advice' dipenuhi. Walaupun terdapat protes dan penafian oleh defendan di dalam pliding, tetapi tiada keterangan yang menunjukkan bahawa defendan memerlukan maklumat tambahan atau dokumen-dokumen tambahan. Defendan juga tidak menggunapakai klausa 'claims control' untuk mengesahkan kesahihan tuntutan yang seterusnya hanya menyokong hujahan plaintif-plaintif bahawa hujahan defendan berkaitan perlanggaran perjanjian oleh plaintif-plaintif dan pembatalan perjanjian oleh defendan adalah pemikiran terkemudian (lihat perenggan 33–34 & 38–39). D E F G

(4) Bagi 'Combined Liability Excess of Loss Treaties', Aon Benfield merupakan broker yang dilantik oleh plaintif dan bertindak sebagai perantara plaintif-plaintif dalam menguruskan pengeluaran berbagai dokumen seperti penyata akaun dwi-tahunan, nasihat bayaran dan/atau nota debit bagi menunjukkan 'net due' daripada plaintif-plaintif berkaitan dengan 'Combined Liability Excess of Loss Treaties', yang diikuti dengan bayaran oleh plaintif-plaintif kepada defendan melalui Aon Benfield. Mahkamah mendapati kaedah pembayaran premium bagi 'Combined Liability Excess of Loss Treaties' adalah selaras dengan Perkara 22 klausa 'Intermediary' di dalam 'Combined Liability Excess of Loss Treaties'. Tambahan pula, mahkamah menerima keterangan bahawa H I

semua bayaran 'net due' oleh plaintif-plaintif kepada Aon Benfield berkaitan dengan, antara lain, 'Combined Liability Excess of Loss Treaties', telah diserahkan kepada panel pemberi reinsurans, termasuk defendan (lihat perenggan 57–58).

(5) Tidak terdapat keterangan berkenaan dengan tindak balas defendan apabila plaintif-plaintif melalui peguamnya menghantar surat-surat tuntutan kepada defendan bagi menuntut bayaran di bawah 'Motor Treaties' dan 'Combined Liability Excess of Loss Treaties'. Penafian yang dibuat sekarang oleh defendan sedangkan pada awalnya dia memilih untuk berdiam diri menunjukkan pemikiran terkemudian oleh pihak defendan. Mahkamah-mahkamah telah memutuskan bahawa di dalam hubungan komersial dan perniagaan, kegagalan satu pihak untuk menafikan tuntutan melalui peguam oleh pihak yang satu lagi adalah terjumlah kepada pengakuan secara tersirat (lihat perenggan 59–60).

(6) Sukar untuk dibayangkan bagaimana caranya untuk defendan berjaya di dalam tuntutan silangnya bagi bayaran premium pelbagai perjanjian reinsurans yang dikatakan tidak dibayar oleh plaintiff-plaintiff berjumlah HKD2,887,788.47. Pertama sekali, plaintif-plaintif telah menunjukkan bahawa tidak terdapat premium yang gagal dibayar memandangkan 'net due' secara positif memihak kepada plaintif kedua. Semua premium yang perlu dibayar bagi 'Combined Liability Excess of Loss Treaties' telah ditunjukkan telah pun dibayar sepenuhnya. Bayaran premium bagi 'Combined Liability Excess of Loss Treaties' telah dibuktikan melalui dokumen sokongan defendan sendiri. Tanpa sokongan keterangan dan berdasarkan keterangan dan dokumen-dokumen yang dikemukakan oleh plaintif-plaintif yang secara kuatnya menunjukkan yang sebaliknya, adalah tidak dapat dielakkan bahawa kes defendan kekurangan merit (lihat perenggan 63–64).]

Cases referred to

Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd [2016] MLJU 1878; [2016] 10 CLJ 247, HC (refd)

Bank Simpanan Nasional v Rudysham Abdul Raof [2016] MLJU 909; [2017] 4 CLJ 234, HC (refd)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)

Juahir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)

KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233, CA (refd)

Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 2 CLJ 337, CA (refd)

Small and Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt [2016] 5 MLJ 220; [2016] 9 CLJ 73, CA (refd)

Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)

Legislation referred to

Evidence Act 1950 ss 8, 17, 114(g)

T Sudhar (Tania Edward with him) (Steven Thiru & Sudhar Partnership) for the plaintiff.

Philip Teoh (Hafeez Johan and Ng Joo Yee with him) (Azmi & Assoc) for the defendant.

Mohd Nazlan J:

INTRODUCTION

[1] This is a writ action by the plaintiffs claiming for payments of claims receivable under a number of reinsurance agreements which had been reinsured by the defendant. The latter counterclaimed for non-payment of premium under certain reinsurance agreements.

[2] At the conclusion of trial I found for the plaintiffs and dismissed the counterclaim, and highlighted my main grounds for my decisions. This judgment contains the full reasons for the same.

KEY BACKGROUND FACTS

The parties

[3] The parties to this suit are involved in the insurance and reinsurance business. The first plaintiff is a general insurance agency firm incorporated under the laws of Hong Kong. The second plaintiff is a general insurance solution provider company incorporated under the laws of Hong Kong and regulated by the Insurance Authority of Hong Kong. The plaintiffs are part of the Dah Sing Group, which is a leading financial services group operating especially in providing banking, insurance, financial and other related services in Hong Kong, Macau and Mainland China.

[4] The defendant is a licensed reinsurance company registered in Labuan, and is incorporated under the laws of Malaysia and regulated by the Labuan Financial Services Authority.

The reinsurance arrangement

[5] The matters alleged in the suit arise from the reinsurance arrangement between the second plaintiff and the defendant. In essence the former ceded to the latter, portions of the benefits and limits of the second plaintiff's underlying original insurance arrangement with its clients (the policy holders) and in consideration, the defendant agreed to undertake the corresponding share of the liabilities. As a ceding company, the second plaintiff pays a premium to the defendant as the reinsurance company, who in exchange would pay a share of the claims incurred by the second plaintiff.

[6] In other words, the defendant agreed to indemnify the second plaintiff pursuant under the arrangement stipulated in the following treaties. First, the Motor Own Damage and Third Party Liability Quota Share Treaty dated 18 May 2010 (Motor Treaty 2010); secondly, the Motor Own Damage and Third Party Liability Quota Share Treaty dated 7 January 2011 (Motor Treaty 2011); and thirdly, the Motor Own Damage and Third Party Liability Quota Share Treaty dated 30 December 2011 (Motor Treaty 2012) (collectively 'the Motor Treaties').

[7] In addition, there were four other treaties, namely, first, the Combined Liability Excess of Loss Treaty dated 30 December 2009 (Combined LELT 2010); secondly, the Combined Liability Excess of Loss Treaty dated 23 December 2010 (Combined LELT 2011); thirdly, the Combined Liability Excess of Loss Treaty dated 30 December 2011 (Combined LELT 2012); and finally the Combined Liability Excess of Loss Treaty dated 28 December 2012 (Combined LELT 2013) ('Combined Liability Excess of Loss Treaties').

[8] The Motor Treaties and the Combined Liability Excess of Loss Treaties, seven in total, are the reinsurance agreements which form the basis of the plaintiffs' claim which is now litigated before this court. The plaintiffs pleaded that the sum of HKD11,592,975.90 being the claim receivable arising from the underlying policies subject to the reinsurance agreements is due and owing from the defendant under the reinsurance agreements.

[9] The counterclaim by the defendant, on the other hand is premised on the allegation that the plaintiffs had failed to pay to the defendant as the reinsurer, the aggregate premium sum of HKD2,887,788.47 payable in respect of five reinsurance arrangements. These are, firstly, the very reinsurance agreements themselves; secondly, the Engineering First Surplus Treaties for 2012 and 2013 ('the Engineering Treaties'); thirdly, the Miscellaneous Accident First Surplus Treaties for 2012 and 2013 ('the Miscellaneous Accident Treaties'); fourthly, the Property First Surplus Treaties for 2012 and 2013 ('the Properties Treaties'); and fifthly, the certain alleged Facultative Policies (collectively 'the Counterclaim Treaties').

[10] It is not in dispute that the Motor Treaties were originally entered into by the first plaintiff and another related entity in the Dah Sing Group, which following certain business restructuring which saw the execution of transfer and novation agreements, resulted in the first and second plaintiffs being the parties to the Motor Treaties with the defendant as the reinsurer. The Motor Treaties have all expired.

[11] The restructuring similarly affected identities of the parties from the Dah Sing Group to the Combined Liability Excess of Loss Treaties, eventually being the two plaintiffs. But this is not a point of dispute in the litigation. It is however important to note that in the Combined Liability Excess of Loss Treaties, the defendant was one of the reinsurers involved and another party, namely Aon Benfield was appointed as the second plaintiff's reinsurance broker. However this appointment was changed via a letter from the second plaintiff dated 30 March 2015 to JLT Re.

[12] The defendant started to face problems in early 2012. There were allegations of imprudent and aggressive underwriting in its operations where the defendant's share of the risk in certain reinsurance contracts being almost 100%. The business of the defendant suffered serious setback arising from insurance claims associated with the floods in Thailand in 2011 and 'loss of mobile handset' incident in South Korea. These two events alone exposed the defendant to an aggregate claims of about USD314m.

[13] The shareholders of the defendant in April 2012 despatched one Mr Sharafat Ali to investigate the matter. Reports were given and actions were taken. He is now acting the CEO of the defendant. He is also DW1. In a letter dated 6 March 2014 addressed to the chairman of the board of directors of the defendant, the Labuan Financial Services Authority restricted the business of the defendant to only the settlement of claims. No new business or renewals are allowed. At least ten insurance companies in Malaysia are said to have instituted legal suits against the defendant.

THE RELIEFS PRAYED FOR

[14] In the suit, the plaintiff pleaded for the following reliefs, as they appear in the amended statement of claim:

> 28 Wherefore the Plaintiffs claim against the Defendant the following:
>
> (a) In respect of the Motor Treaties
>
> (i) an Order that the Defendant does pay to the Plaintiffs the sum of HKD8,333,070.87 in respect of all related losses covered by the Motor Treaties, within seven (7) days from the date of judgment;
>
> (ii) an Order that the Defendant does pay to the Plaintiffs the

subsequent Net Due payable by the Defendant to the Plaintiff's under the Motor Treaties, arising from the Defendant's share of all subsequent payments made by the Plaintiffs for outstanding claims under the Motor Treaties from 1.11.2017 until the date of payment by the Defendants, within seven (7) days from the date of judgment;

(iii) an Order for general damages to be assessed;

(iv) pre-judgment interest on the sum of HKD8,333,070.87 or any other sum awarded by this Honourable Court pursuant to section 11 of the Civil Law Act 1956 from the date of the Writ until the date of judgment at an interest rate of 5% per annum;

(v) post-judgment interest on the sum of HKD8,333,070.87 or any other sum awarded by this Honourable Court pursuant to Order 42 rule 12 of the Rules of Court 2012 from the date of judgment until full and final realization thereof at an interest rate of 5% per annum;

(vi) costs; and

(vii) such further and other relief as this Honourable Court deems fit.

(b) In respect of the Combined Liability Excess of Loss Treaties

(i) an Order that the Defendant does pay to the Plaintiffs the sum of HKD741,533.95 in respect of all related losses covered by the Combined Liability Excess of Loss Treaties, within seven (7) days from the date of judgment;

(ii) an Order that the Defendant does pay to the Plaintiffs the subsequent Net Due payable by the Defendant to the Plaintiffs under the Combined Liability Excess of Loss Treaties arising from the Defendant's share of all subsequent payments made by the Plaintiffs for outstanding claims under the Combined Liability Excess of Loss Treaties from 1.11.2017 until the date of payment by the Defendants, within seven (7) days from the date of judgment;

(iii) an Order for general damages to be assessed;

(iv) pre-judgment interest on the sum of HKD741,533.95 or any other sum awarded by this Honourable Court pursuant to section 11 of the Civil Law Act 1956 from the date of the Writ until the date of judgment at an interest rate of 5% per annum;

(v) post-judgment interest on the sum of HKD741,533.95 or any other sum awarded by this Honourable Court pursuant to Order 42 rule 12 of the Rules of Court 2012 from the date of judgment until full and final realization thereof at an interest rate of 5% per annum;

(vi) costs; and

(vii) such further and other relief as this Honourable Court deems fit.

[15] In its counterclaim, the defendant pleaded the following:

> 24 The Defendant states that based on the above Treaties and Facultative Insurance Contracts, the Plaintiff has failed and/or neglected to pay the total outstanding sum of Hong Kong Dollars Two Million Eight Hundred Eighty Seven Thousand Seven Hundred Eighty Eight and Forty Seven Cents (HKD 2,887,788.47) only. The outstanding sum arises from unpaid premiums due to the Defendant.
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> 25 The Defendant further prays that this outstanding claim under this counterclaim be set off against the Defendant's lability as pleaded in the Plaintiff's Statement of Claim, if any.
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> 26 In any event, the Defendant counter claims against the Plaintiffs for the following:
>
> (i) The sum of HKD 2,887,788.47 and/or any such sum which this Honourable Court deems fit;
>
> (ii) Interest at the rate of 5% per annum until the date of full and final payment thereof or such period as this this Honourable Court deems fit;
>
> (iii) Cost; and
>
> (iv) Any such further orders or reliefs as this this Honourable Court deems fit.

THE PRIMARY CONTENTIONS OF THE PARTIES

[16] The main assertion of the plaintiffs is that the defendant had failed to adhere to the reinsurance agreements to make payment of the net sum due to the plaintiffs under the reinsurance agreements, being the amount arrived at by calculating the difference between the amount of premium payable by the plaintiffs to the defendant and the amount of claims receivable by the plaintiffs from the defendant, despite the plaintiffs having caused to be delivered to the defendant the quarterly statement of accounts to the defendant stating the details on the amount owing under the Motor Treaties and the Combined Liability Excess of Loss Treaties, as well as all proofs of payments made by the second plaintiffs under the pertinent underlying insurance policies.

[17] The plaintiffs contend that despite the plaintiffs' solicitors having sent letters demanding payments of the net due dated 25 November 2015 and 22 September 2016 in respect of the Motor Treaties and dated 5 April 2017 and 31 December 2016 in relation to the Combined Liability Excess of Loss Treaties, the defendant refused to pay since May 2012.

[18] The defendant, on the other hand, in its resistance to this suit, contends that the plaintiffs should be dis-entitled to the sums claimed for because they have failed to comply with the provisions of the reinsurance agreements. The defendant denies that the statement of accounts had been delivered to the

defendant, and that the plaintiffs in any event did not furnish supporting documents to enable the defendant undertake a verification of the claims, despite the defendant's requests.

[19] Furthermore, significantly, the defendant also disputes the validity of the plaintiffs' act of setting off the premium amount due to the defendant from the claim amounts due to the plaintiffs. And the defendant is also claiming that there is unpaid premium due to the defendant from the plaintiffs under the Counterclaim Treaties.

THE TRIAL AND THE WITNESSES

[20] The trial of the suit went on for three days. The plaintiffs called four witnesses. They were:

(a) Jimmy Poon Wing Fai, CEO of the second plaintiff ('PW1');

(b) Lo Sheung Hang, manager, Finance and Accounting of the second plaintiff ('PW2');

(c) Linda Ng Fung Han, senior manager of claims, of the second plaintiff ('PW3'); and

(d) Lin Huaqi, Head of Operations of Aon Benfield China Ltd (PW4 — rebuttal witness).

[21] The defendant called two witnesses, as follows:

(a) Sharafat Ali Shaukat, the CEO (acting) of the defendant ('DW1'); and

(b) Lim Boon Ing, Head of Legal and Claims of the defendant ('DW2').

PRINCIPAL ISSUES TO BE TRIED

[22] The case of the plaintiffs against the defendant, and the counterclaim filed by the defendant in response, in the main give rise to a few very clearly defined issues for determination of this court, as helpfully agreed by the parties. These are as follows.

[23] First is the overarching question whether the plaintiffs are entitled to succeed in the claim for net due under both the Motor Treaties and the Combined Liability Excess of Loss Treaties.

[24] Secondly is the issue as to whether the second plaintiff owed the defendant the sum of HKD2,887,788.47 which was said to have been the unpaid premiums for the counterclaim agreements. A corollary to this second issue is the question whether if there was such a sum owing from the second

plaintiff, any non-payment of premium would entitle the defendant to repudiate the claims made by the plaintiffs. A

EVALUATION AND FINDINGS OF THIS COURT

Whether there is net due to the plaintiffs under the reinsurance agreements as claimed B

[25] In relation to the plaintiffs' principal claim for the net due to the plaintiff under the Motor Treaties and the Combined Liability Excess of Loss Treaties, I am of the view that given the testimony of the witnesses including the key witness for the defendant, the concept of net due is one that is readily implied in the Account & Settlement clause of the Motor Treaties since the words 'account settlement balance' concerns the balance in the statement of accounts which clearly shows the difference between the premium payable and claims receivable, and this constitutes the net due. C D

[26] The clause on account & settlement in respect of the Motor Treaties, states the following: E

> Quarterly within 60 days after the end of each quarter and settlement within 30 days after confirmation of account settlement balance.

[27] Article 10 of the Combined Liability Excess of Loss Treaties similarly reads: F

> The Reinsured shall pay any balance due to the Reinsurer at the same time as the account is rendered. The Reinsurer shall pay any balance due to the Reinsured at the same time the account is confirmed, at the latest, however, within four weeks after receipt of the statement of account. Should the Reinsurer be unable to confirm the account in its entirety, the confirmed portion of the balance shall nevertheless, be paid immediately. G

[28] It is in evidence that premium was paid by way of net due as clearly provided for in the Accounts & Settlement clause of the Motor Treaties as referred to earlier, as the account settlement balance. And this very balance or the net due is the difference between the premium payable and claims receivable. H

[29] The remittance advices show that from May 2010–April 2012, payments of the premium to defendant were effected by setting off the premiums payable against the claims receivable. This resulted for that short period of payment of the net due to the defendant. There was absolutely no complaint by the defendant of this method of payment of the premium. The I

defendant cannot now suddenly take a opposite stance and demand for a separation of premium payable and claims receivable.

[30] The CEO of the second plaintiff ('PW1') gave unchallenged testimony that the monthly procedure for payment of net due for the period from May 2010 to April 2012, which was applied in accordance with the account and settlement clause and established market practice, involved firstly, the delivery of the monthly statement of accounts to the defendant which specified the monthly net due for that period, quarterly within 60 days after the end of each quarter. Secondly the defendant would confirm the statement of accounts, and thirdly, the monthly net due from the plaintiffs to the defendant was paid to the defendant.

[31] In any event, I also accept, given the testimony of all the witnesses for the plaintiff that payment of premium by way of net due is part of established market practice in reinsurance, and in any event more importantly this arrangement of payment of premium by way of net due was in evidence, the mutually accepted course of conduct between the parties, at least between May 2010 and April 2012, without evidence of any suggestion or hint of protest or objection, as admitted by DW1 himself in cross examination, and where the remittance advices showed that payments of the premium to the defendant were effected by setting off the premiums payable against the claims receivable, and the payment of the resulting net due to the defendant. The defendant is therefore estopped from taking a contradictory stand now.

[32] In this connection, the legal principle of estoppel should rightfully operate to prevent and disapprove of the inequitable conduct of the defendant in attempting to mount such a challenge at this juncture by only for the first time disputing the setting off arrangement and insisting on payment of premium separately, in its defence and counterclaim. Reference ought to be made to the decision of the Court of Appeal in *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233, which held as follows:

> We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.
>
> To put it another way, the appellant, by its silence coupled with other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having do so, it ought not to be permitted to now contend otherwise.

It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and it is now beyond question. See *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

[33] Further, I find the defendant's contention that the plaintiffs failed to show each and every single insurance claim in respect of the underlying policies, made against the second plaintiff that resulted in the reinsurance claims by the plaintiff against the defendant to be absolutely without merit. And neither did the defendant identify any provisions in either or any of the Motor Treaties and the Combined Liability Excess of Loss Treaties to such effect. The defendant could not do so because such a provision does not exist.

[34] It is clear that the Motor Treaties and the Combined Liability Excess of Loss Treaties only require notification of losses when the reporting threshold in the preliminary loss advice clauses are met.

[35] For example in respect of the Motor Treaties, the clause on preliminary loss advice and cash loss plainly states:

HKD 250,000 for 100% or the equivalent in other currencies per accident

[36] This clause was confirmed, by no less that the head of claims and legal of the defendant himself (DW2) to mean that only claims in excess of the stated threshold must be notified to the insurer.

[37] Yet, it is in evidence that the plaintiff furnished more than what is contractually required by supplying to the defendant a summary of the total outstanding by way of the statement of accounts, secondly, a breakdown of the total by way of the summarised Monthly Bordereaux, and thirdly, a detailed breakdown of the total sums by way of the detailed Monthly Bordereaux.

[38] Despite protestations and denials by the defendant as expressed in its pleadings, there is no evidence that the defendant had ever required additional information or further documents even on a particular claim despite the defendant having the right to invoke to demand for information under the Claims Co-operation Clause under the Motor Treaty 2012 or article 12 on the Reinsurer's Right to Information under the Combined Liability Excess of Loss Treaties. The defendant's allegation that it was not furnished with the requisite information from the plaintiff is therefore wholly untenable.

[39] Neither did the defendant invoke the claims control clause to verify the authenticity of claims, thus further supporting the plaintiff's assertion that the defendant's argument of breach by the plaintiffs and repudiation by the defendant is a mere afterthought.

[40] It is clear that from April 2012, the defendant infringed the account and settlement clause and the settlement mode, given its failure, as confirmed by the CEO of the defendant no less, to provide its confirmation of the monthly statement of accounts to the plaintiff. The following extract from the cross-examination of DW1 is most pertinent:

> PC : In this case, statement of account were sent from May 2012 to October 2012 by the cedant to the reinsurer to confirm the balance. Did the reinsurer ever confirm the balance?
>
> DW1 : I think no.
>
> PC : Hasn't the reinsurer breached the account and settlement clause by failing to confirm the balance, not once, not twice but over a period of 5 years?
>
> DW1 : They were handling the statement, yes.
>
> PC : And hasn't the reinsurer, Best Re breached the account and settlement clause by failing to confirm the balance from May 2012 onwards?
>
> DW1 : Best Re breach everything because they are on run off. They are not allowed to do the business. So, they are not doing it proper.

[41] Despite the failure of the defendant to give its confirmation in breach of the Account and Settlement Clause in Motor Treaties, the plaintiffs continued to send to the defendant the monthly statement of accounts in respect of the Motor Treaties. However the non-confirmation resulted in the inability of the second plaintiff paying the monthly net due to the defendant from May 2012 to December 2012. From January 2013 onwards however, the defendant has failed to pay the monthly net due, which by then had become positive in favour of the second plaintiff.

[42] As explained in the testimony of PW1 which is not contradicted, it was that the net due of HKD8,333,070.87 as at 31 October 2017, had been arrived at by adding the net due from the statements of accounts under the Motor Treaties from May 2012 to October 2017. As such it is also clear that the second plaintiff had paid all the premium payable under the Motor Treaties.

[43] All these were given for all claims in the Motor Treaties where the preliminary loss advice clause was triggered, as confirmed by PW1 and PW3. There was, I reiterate, no evidence of even a complaint over any failure on the part of the plaintiffs to submit Preliminary Loss Advice Forms to the defendant.

[44] In addition, PW3 explained clearly that the scope of coverage of the Motor Treaties in regards to any particular claim is not dependent on the date of accident of that claim but on the effective date of the underlying policy. For as long as the effective date of the underlying policy is within the period of subsistence of the Motor Treaties, the said underlying policy and claims thereunder would be within the scope of coverage of the Motor Treaties. Curiously this issue was raised by the defendant in the cross-examination of PW3 but not repeated by the defendant vis a vis its own witnesses.

[45] All these, including the fact that there is absolutely no evidence that the defendant ever attempted to invoke its right to verify the authenticity of claims under the claims control clause makes it difficult to characterize the allegation by the defendant of breaches and repudiation by the plaintiffs of the reinsurance agreements other than that it is a convenient afterthought and wholly contrived.

[46] The conduct of the defendant exhibits, at best, an inconsistent stance. The defendant cannot blow hot and cold. It cannot approbate and reprobate. In the case of *Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd* [2016] MLJU 1878; [2016] 10 CLJ 247, I stated thus:

> [43] The position taken by the plaintiffs currently may be characterised as one which violated the principle against 'approbating and reprobating'. In the Court of Appeal case of *Visage Continental Sdn Bhd v Smooth Track Sdn Bhd* [2008] 1 MLJ 101; [2007] 6 CLJ 570, Richard Malanjum JCA (as his Lordship then was) referred to various authorities and enunciated clearly the rule that a party should not be allowed to approbate and reprobate as it is a practice that is both plainly unconscionable and unfair.

[47] That is not all. The plaintiff in fact continued to submit the monthly statement of accounts in respect of the Motor Treaties and the defendant continued not to provide any confirmation, which resulted in the plaintiff's inability to pay the net due to the defendant from May 2012 to December 2012, and the failure by the defendant thereafter to pay the net due to the plaintiff from January 2013 onwards.

[48] To the extent that the preliminary loss advice in the Motor Treaties was triggered, the relevant documents, including policy schedules, policy jacket, claim forms, legal advice, copies of cheques and fee notes had also all been forwarded to the defendant.

[49] All supporting documents as required pursuant to the Preliminary Advice Loss Clause in the Motor Treaties were furnished directly to the defendant by the Claims Department of the plaintiff by way of email. And in respect of Combined Liability Excess of Loss Treaties, relevant documents

would be furnished to the defendant by the plaintiff's reinsurance broker, Aon Benfield and in this respect I find no reason not to accept the evidence of the representative from Aon Benfield provided by way of statutory declaration in the absence of any evidence to the contrary.

[50] I emphasize that there is no legitimate basis for me to doubt the contents of the statutory declaration of Wong Kin Fung, the representative from Aon Benfield despite the deponent not appearing in court to give evidence as a witness. The defendant did not offer anything to contradict the statutory declaration.

[51] There was no complaint that it did not receive documents from Aon Benfield. Neither did the defendant call any witnesses to deny that the documents were sent by Aon Benfield to the defendant.

[52] I therefore agree with the submission of the plaintiff that any cross-examination of the deponent could not have seriously shaken, if at all, his evidence and this justifies this court to accord the full weight to the evidence in the said statutory declaration (see the Federal Court decision in *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61 at p 78).

[53] There is also no suggestion, let alone evidence that the defendant had previously contested that the date of accident of the underlying claim being outside the period of coverage of the Motor Treaties. In any event it was testified that as long as the effective date of the underlying policy is within the period of subsistence of the Motor Treaties, the said underlying policy and claims thereunder would be within the scope of coverage of the Motor Treaties. Thus, again, this new complaint raised by the defendant is entirely baseless.

[54] As testified by PW1, the procedure on the payment of premium in respect of the Combined Liability Excess of Loss Treaties, which involves Aon Benfield as an intermediary, was in compliance with the article 22 Intermediary Clause of the Combined Liability Excess of Loss Treaties would firstly involve Aon Benfield issuing bi-annual Financial Statements, Payment Advices and/or Debit Notes to the second plaintiff specifying the net due from the second plaintiff,

[55] Secondly, the second plaintiff would the pay the net due as stated in the said documents Aon Benfield. Thirdly, and as further supported by PW4, the operations head of Aon Benfield China, Aon Benfield would thereafter forward the payments of the net due by the plaintiffs to the defendant, being one of the reinsurers.

[56] Similarly, there was no evidence that the defendant ever invoked article 12 of the Combined Liability Excess of Loss Treaties. Its contention that the plaintiffs did not provide it with the requisite information is thus entirely untenable.

[57] Separate from the claims under the Motor Treaties, I also find the payment arrangement of the premium for the Combined Liability Excess of Loss Treaties is consistent with the article 22 Intermediary Clause of the Combined Liability Excess of Loss Treaties. As stated earlier, different from the Motor Treaties, for the Combined Liability Excess of Loss Treaties, Aon Benfield was the appointed broker for the plaintiff and acted as the plaintiff's intermediary, in managing the issuance of the various documents such as the Bi-Annual Financial Statements, Payment Advices and/or Debit Notes to show the net due from the plaintiff in relation to the Combined Liability Excess of Loss Treaties, to be followed by payment by the plaintiffs to the defendant through Aon Benfield.

[58] I accept the evidence that all payments of the net due by the plaintiffs to Aon Benfield in respect of, amongst others, the Combined Liability Excess of Loss Treaties, had been given to the panel of reinsurers, including the defendant.

[59] There was similarly no evidence of any response from the defendant when the plaintiff through its solicitors sent letters of demand to the defendant demanding payment under the Motor Treaties and the Combined Liability Excess of Loss Treaties. Again the present denial by the defendant when it chose to remain silent earlier suggests an afterthought on its part.

[60] The courts have held that in commercial and business relationships, the failure of one party to deny a solicitor's demand by the opposing party would amount to an implied admission. In *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155, Gopal Sri Ram JCA (as he then was) held instructively as follows:

> During argument, we registered our surprise at the learned Judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.
>
> In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr J in *Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479-487; [1986] 1 LNS 42:
>
> > In *Wiedemann v Walpole* [1891] 2 QB 534, 537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer

letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise.

Lord Esher MR, in his judgment, remarked,

> Here, we have only to see whether *the mere fact* of not answering the letters, *with nothing else* for us to consider is any evidence in corroboration of the promise. (Emphasis added.)

Earlier, in his judgment, he said, '*Now there are cases — business and mercantile cases in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree*'. (Emphasis added.)

[61] Relatively recently, the Court of Appeal in the case of *Small and Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt* [2016] 5 MLJ 220; [2016] 9 CLJ 73, stated thus:

> (a) In the instant case, it was not in dispute that the respondent did not respond to the demand notice of the plaintiff and the defence alleging that he was not liable was only raised in the statement of defence. Evidently, failing to respond to the plaintiff's letter of demand, that too when the defence case was related to forgery, as well as the fact that the respondent did not lodge a police report upon receiving the demand, weakened the probative force of the defence case. In *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155, the Court of Appeal went to the extreme end to say that failure to respond on the facts of the case should lead to entering of judgment ...
>
> (b) In abundance of caution we must say that failure to respond must not be equated to admission of the claim under s 17 of the Evidence Act 1950 (EA 1950). Failure to respond will relate to conduct under s 8 of the EA 1950. Conduct is a relevant fact for the court to take into account to give the relevant probative force to the version of the plaintiff and/or defendant's case. It is well-settled that not all demand notices must be responded. In *Wiedmann v Walpole* [1891] 2 QB 534, in an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise.
>
> (c) It must also be noted that in commercial cases (not civil), courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree. (See *PECD Construction Sdn Bhd v Freehold Point Sdn Bhd* [2008] MLJU 127; [2008] 3 CLJ 215).

...

[62] The contention by the defendant therefore reeks of an attempt to deny what is so conspicuously plain and obvious. This also runs counter to the decision of the Court of Appeal in *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 2 CLJ 337 which most relevantly held as follows:

> [27] It is axiomatic that it is the duty of the court to give effect to the clear intention of the parties as expressed in cl 5(b) of the agreement which is in clear, unambiguous and unmistakable language. In the *Central Bank of India Ltd, Amritsar v Harford Fire Insurance Co Ltd* AIR [1965] SC 1288 it was held that:
>
> > Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

Whether the plaintiffs fail to make payment of premium to the defendant

[63] It is difficult to see how the defendant could succeed in its counterclaim for alleged unpaid premium by the plaintiffs of a total of HKD2,887,788.47 in respect of various reinsurance treaties. In the first place plaintiffs have shown that there was no unpaid premium as the net due is positive in favour of the second plaintiff. All the premium payable in respect of the Combined Liability Excess of Loss Treaties has been shown to have been fully paid, as analysed earlier vis a vis the net due account balance arrangement for the whole of the reinsurance agreements.

[64] The payment of premium in respect of the Combined Liability Excess of Loss Treaties is substantiated by the defendant's own supporting documents which demonstrate that for each Account Invoice in respect of the Combined Liability Excess of Loss Treaties, the exact amount of net due to the defendant in the Account Invoice had been fully settled. Its supporting documents to the contrary exhibit that premium had been fully paid for the Combined Liability Excess of Loss Treaties, Engineering Treaties, Miscellaneous Accident Treaties and Property Treaties.

[65] The more crucial point is this allegation in the counterclaim of the defendant is clearly inadequately substantiated, when the law squarely places the burden on the defendant to prove its counterclaim, more so as the defendant's own supporting documents tend to confirm payment of the premiums had been made by the second plaintiff.

[66] The defendant has plainly come short on providing evidential support. This does not help progress the case of the defendant. It has in fact the opposite effect.

[67] In this regard, I should refer to the leading decision of the Court of Appeal in *Juahir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1 which reaffirms the rule that 'he who asserts must prove', whereby Siti Norma Yaakob JCA (as she then was) instructively held as follows:

> He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under s 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s 114(g) is invoked against the appellant.

[68] This the defendant plainly failed to establish. As such, in the absence of evidential support and in the face of the testimony and documents exhibited by the plaintiffs referred to earlier that strongly suggest the contrary, the case of the defendant is inevitably one that is considerably lacking in merit, if any. Its perfunctory, self-serving contentions are of little help to the defendant.

[69] There is a specific item of claim of premium payable of HKD749,021.68 in the counterclaim in respect of the Combined Liability Excess of Loss Treaties. But the defendant relied only on the figure of HKD 438,511.30 in premium payable for 2012 and 2013 in the documents shown in court. Despite the pleaded amount of HKD749,021.68, there is in other words no documents to account for the remainder HKD310,510.38.

[70] The plaintiffs however admitted that the premium payable in respect of the Engineering Treaties had been paid save and except for the small sum of HKD915.94. And this (just like the unsupported amount of HKD310,510.38 referred to in the immediately preceding paragraph) is in any event liable to be set-off against the far higher amounts owing from the defendant to the plaintiffs.

[71] Accordingly, there is no premium payable by the plaintiffs to the defendant. The defendant's claim for HKD2,887,788.47 in respect of premium payable under the Counterclaim Treaties cannot therefore succeed.

[72] The issue of whether an alleged non-payment of premium would entitle the defendant to repudiate the second plaintiff's reinsurance claims therefore does not arise at all.

[73] Significantly, in any event, any inability by the second plaintiff to pay the net due for a short period in time after May 2012 (until December 2012) as stated earlier before the net due became payable to the second plaintiff is entirely because of the defendant's own failure to confirm the statement of accounts after May 2012 sent by the plaintiffs. As such, the defendant cannot be allowed to benefit from its own wrongdoing.

[74] In *Bank Simpanan Nasional v Rudysham Abdul Raof* [2016] MLJU 909; [2017] 4 CLJ 234, I had stated thus:

> *No Benefit from Own Default*
>
> [88] It is also my finding that the appellant is additionally subject to the trite principle of law that a party cannot benefit from his own wrong or default, which in this case, being the negligent mistake by the appellant. It is an established presumption in law that parties to a contract do not intend that either party should be able rely on its own breach of obligations to avoid a contract or obtain any benefit under it, unless the contrary is clearly provided for by the contract (see the House of Lords decision in *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1).

CONCLUSION

[75] In conclusion, for the foregoing reasons, I find that the plaintiffs have succeeded in proving their case against the defendant. I therefore allow the claim of the plaintiffs as prayed for in para 28 of the amended statement of claim with the updated claims figures stated in para 152 of their written submissions. The counterclaim of the defendant is dismissed.

Plaintiffs' claim allowed; defendant's counterclaim dismissed.

Reported by Dzulqarnain Ab Fatar